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1 Nitke
2 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF PENNSYLVANIA
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4 FREE SPEECH COALITION, INC. et
4 al.,

5
5 Plaintiffs,

6 v. No. 09-4607

7 THE HONORABLE ERIC H. HOLDER,

8 Defendant.
9
9 -----x

10
10 March 16, 2013
11 10:05 a.m.
12
13

14 Deposition of BARBARA NITKE, taken by
15 Defendant, at the United States Attorney's
16 Office, One St. Andrew's Plaza, New York, New
17 York, before Samuel G. Mauro, Jr., a Registered
18 Merit Reporter and Notary Public of the State of
19 New York.
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educational activities or were they at the parties or some other kind of --

A. Both. And sometimes privately in people's cabins.

Q. When you started taking these photographs, 2257 had already gone into effect, is that right?

A. I believe so.

Q. Were you following 2257 procedures at the time, during this period when you were taking these photographs?

A. Yes.

Q. So you would always check the IDs?

A. Well, if it was a picture that I was going to use and publish, then I would take a photograph of their ID and I would have them fill out the form that I have, which lists all their aliases and whatever, and I would have them sign a model release. If it was a picture I was not going to use myself, that I was just shooting for them, then, no, I wouldn't.

Q. Why was that?

A. Because I wasn't going to publish the picture.

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that

Q. When did the photocopying of IDs happen for these? Was it at the same time as when the releases were signed?

A. The photocopying?

Q. Well, at the time you were following the 2257 procedures, so there must have been --

A. No. What I would do -- let's say there's an event of, I don't know, 300 people, 100 of them have signed model releases when they registered. Maybe out of that there are ten of them that I think I am going to photograph for myself.

I would have them sign another model release to me and the 2257 work and I would take a photograph of their driver's license. So they would have signed a model release for the event and one for me.

Q. When you distinguish between the photographs that you think you will take for your own use, and I guess there are some other set of photographs that you would be taking for the event, is that right, or for the event or for the individuals?

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2 A. For the individuals.

3 Q. So that set of photographs is where
4 your understanding was that the 2257
5 requirements did not apply?

6 A. Well, yes. Because the images were
7 not going to be published or put on a website.
8 They were for private use only.

9 Q. This period that you are describing,
10 you said there was a period when you were making
11 that calculation between 1994 and 1999 and then
12 between 1999 and 2007.

13 What happened in 1999 that caused --
14 that was a change?

15 A. I started shooting color film instead
16 of black-and-white infrared film.

17 In that earlier period I was shooting
18 black-and-white shots that -- well, the body of
19 work was to show sadomasochism as an expression
20 of love between adults. And in the next body of
21 work I switched over to color, and I was more
22 exploring, I was just exploring it in a
23 different way. So in my own mind it is a
24 different body of work. It is often the same
25 people.

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2 the model list somewhere on the shoot list also?

3 A. Yes.

4 Q. And then on the shoot list you also
5 indicate that there were, for example, the first
6 line in February 2005 at the Winter Fire BDSM
7 event, was that one of the conferences?

8 A. Yes.

9 Q. And you took 953 shots of around 100
10 models for the models' private use?

11 A. Correct.

12 Q. That's what you described previously,
13 where you took this other set of photographs
14 that was not to be published, so you didn't keep
15 2257 records for those?

16 A. Correct.

17 Q. Just to understand exactly, was this
18 like at a baseball game where there is a
19 photographer who takes your photograph and then
20 asks you if you want a copy and then you order a
21 copy, or was this something different?

22 A. No. Well, again, they all operated
23 maybe a little differently. But usually I would
24 be at the event available to take pictures, and
25 I would give the shots to the event coordinator

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so that they could share them with people as needed. Sometimes people would ask me to write a CD for them, and there would be a small charge for me to do that, but I would have to edit out their photos for them. But other times the event people would just do it for them.

Q. In those cases you would provide these photographs to the event coordinator?

A. Yes.

Q. You said you didn't charge for your -- did you receive a fee for when you were --

A. No. They would let me go to the event for free in return for my taking pictures for people.

Q. Then you would give the photographs of the event, including photographs of individuals, to the event coordinator and then that person would just allow the individuals to get copies?

A. Correct.

Q. So for this one involving M.R. and P.C., you listed the event --

MS. BAUMGARDNER: Can you give the date.

THE WITNESS: 2007.

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2 applicable to your work.

3 A. No. I have a one-room apartment, and
4 I have an area that's 18 percent of the square
5 footage of my studio apartment that's allocated
6 to my business. And it's not a shooting studio.
7 It is an office office. It is just a section of
8 my apartment.

9 Q. When you say 18 percent, do you
10 know --

11 A. That's for tax reasons.

12 Q. You know that percentage because you
13 claim that as a business property?

14 A. Correct.

15 Q. Whatever that is for the tax deduction
16 for business use of your home --

17 A. Correct.

18 Q. -- for home office or whatever.

19 What do you mean by "close proximity,"
20 when you say you have to remain in close
21 proximity to your home?

22 A. My understanding of the law is that
23 the government inspectors have to be able to
24 drop by at any moment during the day at any time
25 and be allowed access to inspect the records.

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Q. Can they always tell if the person is not a minor?

A. No.

Q. So you are not saying that it is possible to identify the age of an individual just by looking at your photograph?

A. Well, I think in most cases it's possible to know that somebody's older.

Q. Older than what?

A. Older than 21, let's say. A lot of the people I photograph -- perhaps I didn't say that well. Most of the people I photograph are in their 30s or 40s and even older, so I don't think that they can be confused with younger people because they look like they're 30, 40, whatever.

The people that I photograph that are in their 20s, there aren't very many people that I photograph that are in their 20s, and I don't select people in their 20s who look young. I am not trying to go for that. So I think the average person looking at one of my photos would know that the people are over 21 for sure.

Q. But they couldn't identify a specific

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2 attended those events who definitely did not
3 want to be photographed?
4 A. Correct.
5 Q. And there were some who would consent
6 to being photographed, but only for their own
7 private use?
8 A. Correct.
9 Q. And then there was a group who would
10 agree to be photographed and allow you to
11 publish their images?
12 A. Correct.
13 Q. What I want to focus on is the middle
14 group, who agreed to be photographed, but for
15 their own private use.
16 A. Yes.
17 Q. I understand your interpretation of
18 the law was that 2257 did not require you to
19 collect their photo IDs, is that correct?
20 A. Yes.
21 Q. Because it was just for their private
22 use?
23 A. Correct.
24 Q. Knowing this, the group of people as
25 you did and having become immersed in this

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2 community, if you had told them that as a
3 condition of taking their images just for their
4 own private use that you nevertheless would have
5 to have their photo IDs, have to make copies of
6 them, have to keep those copies with you and
7 make them available for government inspection,
8 is it likely that they would have given you
9 those photo IDs?

10 A. No. Not the people that just want the
11 pictures for privately.

12 MS. BAUMGARDNER: All right. That is
13 all I have.

14 MS. WYER: I have some follow-up
15 questions.

16 EXAMINATION

17 BY MS. WYER:

18 Q. Did you ever ask those individuals to
19 provide their IDs, the individuals in the middle
20 group?

21 A. No. Because they were saying going in
22 that it was just -- that they didn't want me to
23 publish them, so it was just for private.

24 Q. Why do you think that they would not
25 have -- did you know who those individuals were?

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2 Q. Yes.

3 A. -- at the events? OK.

4 It looks like 950 models at these
5 events, but there would be some overlap, so 750
6 models maybe.

7 Q. In any instance where you took these
8 photographs, did you ever have any doubt about
9 the person's age?

10 A. No.

11 Q. Did you ever check the IDs of the
12 person just to verify the age?

13 A. These are at these SM events where you
14 won't get in if you're underage. It will not
15 happen.

16 Q. You are no longer photographing these
17 events, correct?

18 A. No.

19 Q. Do you know anyone else who is
20 photographing these events?

21 A. I'm kind of out of touch. I don't
22 know what they're doing at those events right
23 now for photos.

24 Q. So you can't identify anyone else who
25 is photographing these events?

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2 A. Not at the moment. It's been a few
3 years since I have been -- you know, I'm out of
4 the loop.

5 MS. WYER: I think that's it. Thank
6 you again.

7 THE WITNESS: OK.

8 MS. BAUMGARDNER: I have just a few
9 follow-up.

10 THE WITNESS: OK.

11 EXAMINATION

12 BY MS. BAUMGARDNER:

13 Q. The point I want to make is how many
14 models did you come up with?

15 A. A guestimate of 750. We added up 950
16 people total, and if there's overlap of a couple
17 hundred, that means there would be 750.

18 Q. OK.

19 A. That's probably a maximum.

20 Q. But for each of these shoots there
21 were many more depictions; for instance, on
22 Exhibit 4 of 100 models there were 953 pieces of
23 expression?

24 THE WITNESS: Are you talking about
25 the number of depictions?

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2 Q. No, Ms. Wyer wasn't. I am just asking
3 you.

4 A. Oh, yes.

5 Q. Because we are not talking just about
6 people, but we are talking about a body of
7 expression, correct?

8 A. Correct.

9 Q. So this event in May 2005 there were
10 2500 depictions or photos that you took?

11 A. Right.

12 Q. So we are talking thousands, I think,
13 of photos?

14 A. Yes.

15 Q. Potentially a healthy number of these
16 people would not have provided their photo ID?

17 A. I think that's correct.

18 Q. The other point I wanted to make is,
19 and I think you stressed this, in this lifestyle
20 anonymity is sacrosanct, correct?

21 A. Yes.

22 Q. And in order to participate in the
23 lifestyle, privacy and anonymity was important
24 to everyone?

25 A. Yes.

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CERTIFICATE

STATE OF NEW YORK)

: ss

COUNTY OF NEW YORK)

I, Samuel Mauro, Jr., a Registered
Merit Reporter and Notary Public within and for
the State of New York, do hereby certify:

That BARBARA NITKE, the witness whose
deposition is hereinbefore set forth, was duly
sworn by me and that such deposition is a true
record of the testimony given by such witness.

I further certify that I am not
related to any of the parties to this action by
blood or marriage and that I am in no way
interested in the outcome of this matter.

In witness whereof, I have hereunto
set my hand this _____ day of
_____ 2____.

SAMUEL G. MAURO, RMR